

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT D. McELHANEY,

Appellant,

v.

SOUTHWEST AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB No. 80-75

PROPOSED FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a \$250 civil penalty for an outdoor fire allegedly in violation of respondent's Section 400-035 of its General Regulations for Air Pollution Sources and RCW 70.94.775, came on for formal hearing before W. A. Gissberg, as hearing examiner for the Board, on September 24, 1980, at Longview, Washington.

Appellant appeared pro se. Respondent appeared by its attorney, James Ladley.

From the evidence addressed comes the following:

EXHIBIT A

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260, has filed with this Board a certified copy of its regulations and amendments thereto, of which official notice is taken.

II

Robert D. McElhaney, hereinafter appellant, owns a farm and resides at Route 1, Box 1-A, LaCenter, Washington, within the jurisdiction of the Southwest Air Pollution Control Authority (SWAPCA), upon which was situated a 10 foot x 12 foot shed. The structure had at one time been a residence but at all times relevant to this appeal was used by appellant's children as a playhouse. Some of the walls of the interior had been covered by carpeting remnants and a kitchen cabinet remained inside.

III

Appellant permitted one Larry Blazer to run 5 or 6 head of cattle on the farm in return for which it was Blazer's responsibility to keep the fences surrounding the farm in repair. Appellant exercised no control over the methods utilized by Blazer in keeping the fences in repair.

IV

Desiring to be rid of the shed appellant was advised by the LaCenter fire department that before it could be burned the carpet had to first be removed from it. However, before that could be accomplished the weight of snow upon the roof rendered it too

PROPOSED FINDINGS OF FACT,
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1 dangerous, in appellant's opinion, to enter. Accordingly, appellant
2 and his wife and Mr. Blazer discussed other means of disposing of the
3 shed. No permit was obtained for burning it.

4 V

5 In early March, 1980, unknown to appellant and not acting with his
6 permission nor under his direction, Blazer set the shed afire and then
7 notified appellant of that fact. When appellant first observed the
8 fire the shed was engulfed in flames and there was no means by which
9 he could extinguish it although he carried a bucket of water to the
10 scene in an attempt to save a nearby tree.

11 VI

12 SWAPCA served appellant with its Notice of Violation and imposed a
13 civil penalty of \$250 alleging a violation of RCW 70.94.775.

14 VII

15 Any Conclusion of Law which should be deemed a Finding of Fact is
16 hereby adopted as such.

17 From these Findings of Fact comes the following:

18 CONCLUSIONS OF LAW

19 I

20 RCW 70.94.775 provides that:

21 No person shall cause or allow any outdoor fire: (1)
22 containing . . . asphalt, petroleum products, paint .
23 . . or any substance other than natural vegetation
24 which normally emits dense smoke . . .

25 The fire contained material prohibited by the foregoing statute.

26 PROPOSED FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

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II

This case is governed by Puget Sound Air Pollution Control Agency v. Kaiser Aluminum & Chemical Corporation, 25 Wn App 273. That decision requires proof of scienter, i.e., to "knowingly cause" or "knowingly permit" air pollution. Although the 1980 legislature has since abrogated that requirement by appropriate amendment to RCW 70.94.040 the amendment cannot have retroactive effect.

III

SWAPCA contends that Section 400-035(4) of its regulation is sufficient to uphold the civil penalty. It states:

It shall be (prima facie) evidence that the person who owns or controls property on which an open fire . . . occurs has caused or allowed said open fire.

Although appellant owned and controlled the land upon which the prohibited material was burned, all of the direct testimony addressed at the hearing was that appellant did not knowingly cause or permit the fire. Accordingly, the prima facie case presented by respondent has been overcome.

IV

Respondent contends that since the fire was ignited by Mr. Blazer, his knowledge or scienter is imputed to appellant. We would have no hesitancy in finding such if the evidence warranted a conclusion that Mr. Blazer was an employee or agent of appellant. However, the evidence adduced is to the contrary.

V

Appellant did not violate the statute then in effect and accordingly the Notice of Violation and civil penalty must be stricken.

VI

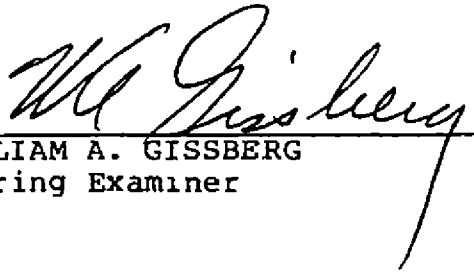
Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

ORDER

The Notice of Violation and civil penalty is stricken.

DATED this 30th day of September, 1980.

POLLUTION CONTROL HEARINGS BOARD


WILLIAM A. GISSBERG
Hearing Examiner